

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION**

LEE YOUNG AND CHARLES J. MIKHAIL

PLAINTIFFS

V.

NO. 1:09-CV-669

RICHARD F. SCRUGGS, INDIVIDUALLY;
SMBD, INC., DIRECTLY AND AS SUCCESSOR
IN INTEREST TO SCRUGGS, MILLETTE BOZEMAN,
AND DENT A/K/A SMBD, AND AS SUCCESSOR IN
INTEREST TO SCRUGGS LEGAL, P.A.; AND
DOE DEFENDANTS 1-20

DEFENDANTS

DEFENDANTS' MOTION TO STRIKE PURPORTED RETURN OF SUMMONS

Defendants Richard F. Scruggs and SMBD, Inc. ("Defendants"), request this Court to strike the purported return of summons as to Defendant Richard Scruggs filed by Plaintiffs on January 25, 2010 (Dkt. No. 23). In support of this Motion, Defendants state as follows:

1. Defendants filed their Motion to Dismiss and supporting Memorandum Brief on Monday, December 21, 2009. Plaintiffs responded on Monday, January 4, 2010. Defendants' served their rebuttal brief on Tuesday, January 20, 2010.

2. Among other relief sought in their Motion to Dismiss, Defendants have asked this Court to dismiss Plaintiffs' claims against Defendant Richard Scruggs for failure to sufficiently serve Scruggs with a summons and Complaint. Specifically, Defendants have noted that Plaintiffs have failed to submit a return of service under oath (as required by FRCP 4(l)(1)) and that the certified mail receipt (attached to their Opposition Brief as Exhibit "A") does not satisfy FRCP 4(e)(1) and the relevant Mississippi and Kentucky procedural rules for certified mail service.

3. On January 25, Plaintiffs filed a return of summons as to Defendant SMBD (Dkt. No. 22) and a purported return of summons as to Defendant Richard Scruggs (Dkt. No. 23).

4. The SMBD Return reflects the testimony under oath of a process server indicating that she served Charlene Bosarge, an officer in the company. SMBD does not contest service of the summons and Complaint on Ms. Bosarge.

5. In contrast, the Richard Scruggs Return is not signed under oath as required by FRCP 4(l)(1). *See, e.g., Economy Stone Midstream Fuel, LLC v. M/V A.M. Thompson*, 2009 WL 973441, *1 (N.D. Miss. April 9, 2009) (holding FRCP 4(l)(1) requires affidavit from process server); *Patterson v. Brown*, 2008 WL 219965, *12 (W.D. N.C. January 24, 2008) (finding attorney's unsworn assertions insufficient to satisfy FRCP 4(l)(1)). The Richard Scruggs Return fails to satisfy the requirements of FRCP 4(l)(1). This Court should strike this purported return of summons.

FOR THESE REASONS, Defendants request that this Court strike the return of summons as to Defendant Richard F. Scruggs filed by Plaintiffs on Monday, January 25, 2010 (Dkt. No. 23). Defendants request such other relief as the Court deems appropriate under the circumstances.

THIS, the 25th day of January, 2010.

RICHARD F. SCRUGGS AND SMBD, INC.

/s/ J. Cal Mayo, Jr.
J. CAL MAYO, JR. (MB NO. 8492)
POPE S. MALLETT (MB NO. 9836)
PAUL B. WATKINS (MB NO. 102348)
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CERTIFICATE OF SERVICE

I, J. CAL MAYO, JR., one of the attorneys for Defendants Richard F. Scruggs and SMBD, Inc., do certify that I have electronically filed the foregoing document with the Clerk of the Court using the ECF system, who forwarded a copy of same to the following:

James R. Reeves, Jr.
Matthew G. Mestayer
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ATTORNEYS FOR PLAINTIFFS

THIS, the 25th day of January, 2010.

/s/ J. Cal Mayo, Jr.
J. CAL MAYO, JR.